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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL ROBERT HITCHNER,

Defendant and Appellant.

D054345

(Super. Ct. No. SCD181397)

APPEAL from an order of the Superior Court of San Diego County, Frederick Maguire, Judge. Reversed and remanded.

Daniel Robert Hitchner appeals an order denying his petition for relief pursuant to Penal Code¹ section 1203.4 from his earlier guilty plea to importing and possessing child pornography. He contends in part that the superior court relied on inadmissible evidence in denying his petition and failed to exercise its discretionary power to grant his petition

¹ All further statutory references are to the Penal Code except as otherwise noted.

even if it concluded that he had violated the conditions of his probation in certain respects. We agree that the superior court relied on certain inadmissible evidence and conclude that it failed to apply the correct legal standard in ruling on Hitchner's petition. As a result, we reverse the order and remand the matter for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2004 Hitchner pled guilty to importing and possessing child pornography; the following month, the court suspended sentence and placed him on formal probation for one year, followed by two years of summary probation. While on probation, Hitchner was subject to numerous conditions, including that he (1) live in a residence approved by his probation officer; (2) report to the probation officer as directed; (3) report any change of address within 72 hours; (4) not use or possess a computer unless approved by the probation officer; and (5) only have contact with his son and stepdaughter when another adult, approved by his probation officer, was present unless otherwise permitted by his probation officer or his therapist. The court specifically authorized Hitchner, who was in the Navy, to move to Maryland or Pennsylvania.

Hitchner thereafter moved to Maryland with his family and supervision of his probation was transferred to a probation office in Hyattsville, Maryland. According to a report by the San Diego County Probation Department (the Department), the following transpired thereafter: In May 2005, while Hitchner was still on formal probation, the Hyattsville probation department sent to the Department an offender violation report stating Hitchner had violated the terms of his probation by (1) moving to Frederick, Maryland after approval to do so had been revoked; (2) possessing an internet-capable

computer and living with children without the approval of his Maryland probation officer; and (3) failing to respond to voicemail and written correspondence from that probation officer. Based on Hitchner's failure to respond, the Maryland probation office closed its supervision of his case. After sending Hitchner a letter to the Frederick, Maryland address that the Maryland probation department provided and leaving several voicemail messages for him, the Department succeeded in reaching him in July 2005. The San Diego probation officer advised Hitchner that the Maryland probation department had closed its supervision of his probation. The San Diego probation officer ordered him to return to California and provide the Department, no later than August 19, with proof that he had reestablished San Diego residency. The officer also informed Hitchner during that call and in writing that a failure to comply would result in the Department seeking a bench warrant for his arrest. Hitchner did not comply with the probation officer's requests.

On August 29, 2005, the Department sought a court order revoking Hitchner's probation and a bench warrant. The court issued a bench warrant but recalled it in May 2006, at the Department's request, in light of the conversion of Hitchner's probation from formal to summary probation on August 19, 2005.

In September 2007 Hitchner filed a petition to have his convictions set aside pursuant to section 1203.4; he was represented by the public defender's office at that time. In October 2007 the Department filed with the superior court investigation reports stating that records searches indicated that Hitchner was eligible for the requested relief. The district attorney opposed the petition based on the Department records showing that

Hitchner had failed to comply with the conditions of his probation, a prerequisite for obtaining section 1203.4 relief. The petition was taken off calendar and thus the court never ruled on it.

In August 2008 Hitchner, through retained counsel, filed another section 1203.4 petition relating to his child pornography convictions. The district attorney's office again opposed the petition on the same grounds. Hitchner argued that no court had ever found him to be in violation of his probation and objected that the Department records were hearsay and thus did not constitute competent evidence in support of the district attorney's accusations. He also submitted a declaration averring that: (1) he had received approval from the Maryland probation office to move after he was discharged from the Navy and was no longer eligible to stay in military housing; (2) the Maryland officer permitted him to have a computer in his home so long as it did not have internet access, which the computer in his home did not have; (3) he had always lived with his wife, stepdaughter and son and the Department was "well aware" of this but never told him that this violated his probation; and (4) he had met with his probation officer "every time [he] was required to and had an appointment" except one appointment scheduled a few weeks prior to the end of his probation period that the officer missed as the result of a vacation.

The superior court denied Hitchner's petition, finding that, although "[s]omebody [in probation had] messed this thing up, big time," it nonetheless "ha[d] a good faith basis to believe [Hitchner] did not comply with the terms of probation." Hitchner appeals.

DISCUSSION

Section 1203.4 provides in part:

"(a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, . . . or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he . . . is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his . . . plea of guilty or plea of nolo contendere and enter a plea of not guilty; . . . and . . . the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he . . . shall thereafter be released from all penalties and disabilities resulting from the offense of which he . . . has been convicted"

Section 1203.4, subdivision (a) thus " 'reward[s] an individual who successfully completes probation by mitigating some of the consequences of his conviction.' "

(*People v. Mgebrov* (2008) 166 Cal.App.4th 579, 584.) A defendant who petitions for relief under section 1203.4 is entitled as a matter of right to the benefits provided for therein if he shows he " 'has fulfilled the conditions of probation for the entire period of probation.' " (*People v. Chandler* (1988) 203 Cal.App.3d 782, 788.) Even if the defendant is unable to make such a showing, the court retains discretion to grant relief in the interests of justice. (*People v. Hawley* (1991) 228 Cal.App.3d 247, 250, fn. 3.)

As a preliminary matter, Hitchner appears to contend that because the Department did not seek to have his probation revoked during his probationary period, the court could not deny his section 1203.4 petition. He cites no authority for such a proposition, which is, in any event, contradicted by section 1203.4. That statute contains no such limitation

and in fact focuses on whether a defendant violated the conditions of his probation during the probationary period, not whether the probation department sought to have probation revoked during that period.

Hitchner also challenges the superior court's reliance on information set forth in the Department's supplemental report as a basis for denying his section 1203.4 petition, arguing, as he did below, that the report consists of multiple levels of hearsay. The Attorney General responds that the court was entitled to consider, and rely on, the report because it was "reliable documentary evidence."

Undisputedly, a probation report is frequently made admissible pursuant to Evidence Code section 1280, which provides:

"Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered . . . to prove the act, condition, or event if . . . :

"(a) The writing was made by and within the scope of duty of a public employee.

"(b) The writing was made at or near the time of the act, condition, or event.

"(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

The trustworthiness component of this exception to the hearsay rule is established by a showing that the written report is based on the observations of public employees who have a duty to observe the facts and report and record them correctly. (See generally *People v. Parker* (1992) 8 Cal.App.4th 110, 116.) Whether the trustworthiness requirement has been met is a matter within the superior court's discretion. (*Ibid.*)

Here, the San Diego probation report contained not only statements about the San Diego probation officer's attempted and effected interactions with Hitchner, but it also purported to summarize statements made in an offender violation report prepared by the Maryland probation officer regarding Hitchner's lack of compliance with the conditions of his probation while in Maryland. As to the latter, the report was not based on the San Diego officer's personal knowledge or his first-hand observations and thus did not bear the indicia of trustworthiness that the underlying offender violation report (which was for unexplained reasons not provided to the superior court) would have had. Moreover, the summarized statements from the offender violation report were contradicted by Hitchner's own declaration and called into question by the Department's own investigative reports indicating that as of October 2007 its records showed that Hitchner was eligible for the requested relief. Under such circumstances, we conclude that the superior court abused its discretion in considering the probation report's summary of the Maryland offender violation report as evidence that Hitchner violated the terms of his probation.

In addition, the court also applied the wrong standard in concluding that the report established "a good faith basis to believe [Hitchner] did not comply with the terms of probation." Pursuant to section 1203.4, the court needed to make a finding on whether Hitchner had shown by a preponderance of the evidence that he had complied with the terms of his probation and, if it concluded that he had not made such a showing, determine whether the granting of relief was nonetheless justified in the interests of justice. The court's application of a "good faith" standard was erroneous and thus

constituted an abuse of discretion. (See *Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239 [recognizing that a trial court's application of the wrong test or standard constitutes an abuse of discretion].)

DISPOSITION

The order denying Hitchner's petition for relief under section 1203.4 is reversed and the matter is remanded for additional proceedings consistent herewith.

NARES, Acting P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.